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DEC 15 1992

December 14, 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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DEC 15 1992

VIA FEDERAL EXPRESS

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M. Street, NW, Room 222
Washington, DC 20554

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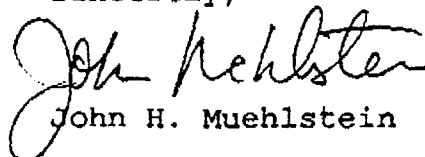
RE: Reply Comments filed in Response to Notice
of Proposed Rulemaking in MM Docket 92-260
(In the matter of Implementation of the
Cable Television Consumer Protection and
Competition Act of 1992 Cable Home Wiring)

Dear Ms. Searcy:

Enclosed for filing are the Reply Comments of
WJB-TV Limited Partnership which are submitted in
response to the Notice of Proposed Rulemaking released
on November 6, 1992 in the MM Docket No. 92-260.
Pursuant to Paragraph 8 of the Notice, an original and
nine (9) copies are enclosed so that each Commissioner
may receive a personal copy.

If you have any questions or need additional
information, please advise.

Sincerely,


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Enclosure

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Mr. Robert A. Brannon
(all with enclosure)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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In the matter of:)
)
Implementation of the Cable)
Television Consumer)
Protection and Competition)
Act of 1992)
)
Cable Home Wiring)
)

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MM Docket 92-260

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF WJB-TV LIMITED PARTNERSHIP

WJB-TV Limited Partnership, by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its Reply Comments in response to the Notice of Proposed Rulemaking in this proceeding.

First and foremost, WJB wishes to stress, as did many Commenters, that one of the principal objectives of this proceeding is to promote competition in the video marketplace. Comments of Nynex Telephone Companies ("Nynex") at 2; Comments of Bell Atlantic ("Bell Atlantic") at 2; Comments of Media Access Project ("MAP") at 3; Comments of American Public Power Association ("APPA") at 4. WJB does not advocate any course of action for the purpose of destroying the property or contractual interests of any party. WJB simply asks the Commission to take appropriate action to prevent an installer¹ of wiring from relying upon an ownership claim to thwart

¹ By use of the word "installer", WJB contemplates that the same rules should apply to cable companies, MMDS operators, SMATV operators, and other providers of video services. Thus, the Comments outlined herein would be applicable to WJB, as well as to its competitors.

1 competition and maintain its monopoly status in the marketplace.

2 It is apparent that many installers can and do use this
3 issue to exclude competition. Several providers of video services,
4 including WJB, have apparently been subjected to such claims.
5 Comments of Wireless Cable Association International, Inc. ("WCA")
6 at 4. Some, including WJB, have even been threatened with criminal
7 actions. Id. Apparently, some installers have gone so far as to
8 threaten individual subscribers with criminal prosecution. Id.

9 Even if no threat is ever made, the mere claim to the
10 wiring can have serious anti-competitive effects. Many customers
11 simply will not switch service providers if they perceive a
12 "hassle" or the need to completely re-wire their homes. Comments
13 of Liberty Cable Company, Inc. ("Liberty") at 3. According to one
14 Commenter, a survey demonstrated that twenty-five percent of the
15 potential customers in one town would refuse to switch providers if
16 re-wiring was necessary. APPA at 12. Accordingly, the value of
17 inside wiring is not in its cost savings, but in the fact that it
18 will reduce the burdens on potential subscribers. Liberty at 3;
19 WCA at 3.

20 WJB will not attempt to reply to all matters raised in
21 the Comments, but will instead focus on only three issues, all of
22 which relate to the issue of competition in the marketplace.

23
24 1. In most, if not all, cases, the homeowner should be
25 deemed to already own the wiring.
26

27 WJB believes that the Commission should declare all
28 wiring installed henceforth to be the property of the homeowner.
29 This position would eliminate all disputes on the issue and is

1 supported by several other Commenters. Liberty at 6; WCA at 7.

2 In order to protect fully the property rights of
3 installers, WJB advocates a slightly different approach in the case
4 of existing wiring. WJB believes that the burden should be placed
5 on the installer to sustain an ownership claim. The installer
6 would be required to satisfy each element of a four-part test,
7 which is derived predominantly using factors deemed relevant by
8 courts that have considered the issue. These factors are:

- 9 1. whether the subscription agreement includes a
10 specific reservation of ownership or otherwise
11 restricts the homeowner's use of the wiring;
12
- 13 2. whether the cable operator has consistently paid
14 property taxes on all of the inside wiring;
15
- 16 3. whether the wiring was installed in such a manner
17 so that it has not become permanently attached to
18 the homeowner's property; and
19
- 20 4. whether the company typically removes the wiring
21 upon termination of service.
22

23
24 Comments of WJB Limited Partnership ("WJB") at 8-11.
25

26 Another recommendation which has merit is that proposed
27 by a group of local government officials. Comments of National
28 Telecommunications Officers and Advisors, et. al. ("NTOA") at 2;
29 Comments of the New York City Department of Telecommunications and
30 Energy ("New York City") at 6. In essence, these parties suggest
31 that a customer should be deemed to own existing wiring if:

- 32 1. he paid an installation fee or the installation fee
33 was waived by the cable operator;
34
- 35 2. he has maintained service for a reasonable minimum
36 period of time, such as one year; or
37
- 38 3. the franchise agreement specifies a reduced
39 installation fee or no installation fee.
40

1 Regardless of which recommendations are ultimately
2 adopted, the Commission should pay special attention to the
3 "installation" or "initiation" fees typically charged a homeowner.
4 The principal purpose for these fees is to recover the labor and
5 material costs of making the installation. Therefore, it is likely
6 that in many instances, the homeowner has already paid for the
7 wiring which is the subject of the dispute. Bell Atlantic at 5;
8 Liberty at 5-6.

9 Several cable companies contend that these fees, in and
10 of themselves, do not recover the costs of installations. Comments
11 of Cablevision Systems Corporation ("Cablevision Systems") at 4;
12 Comments of Blade Communications, et al. ("Blade") at p. 13;
13 Comments of Time Warner Entertainment Company, L.P. ("Time
14 Warner"), at 26; Comments of Tele-Communications, Inc. ("TCI"), at
15 7. In light of the substantial size of these fees, this contention
16 is subject to scrutiny. Bell Atlantic at 2-3. Furthermore, in
17 some instances, an installer may actually collect multiple fees on
18 the same wiring. For example, if a customer whose premises have
19 previously been wired subscribes to cable, he typically must pay
20 the installation fee, even though no new wiring is installed.
21 Liberty at 5. As a result, in at least some instances, it is
22 likely that installers actually collect more than the cost of an
23 installation.

24 WJB does not object to allowing an installer of existing
25 wiring who can establish ownership to be compensated upon the
26 termination of service, assuming that he can establish that the
27 wiring has any salvage value. From the wide range of Comments

1 submitted on this issue, however, it is apparent that the
2 Commission will have to establish standards for valuing this
3 wiring. WJB believes that these standards should focus on salvage
4 value or depreciated book value. Obviously, since the wiring is no
5 longer being used by the installer, its value to the installer is
6 minimal. Even if the Commission were inclined to consider "going
7 concern" value as some cable companies advocate, Comments of Times
8 Mirror Cable Television ("Times Mirror") at 6-7, such a value to an
9 installer who is not providing services would, again, be minimal.

10
11 2. Regardless of who owns the wiring, homeowners should
12 be able to use it, free of charge, for whatever
13 legal purposes they choose, including the reception
14 of programming from an alternative video supplier.
15

16 Regardless of who is deemed to be the owner of the
17 wiring, the Commission should allow homeowners to use it for
18 whatever legal purposes they choose, including the reception of
19 programming from alternative providers of video services. Many
20 Commenters suggest a parallel to the rules in place with respect to
21 telephone wiring. Comments of BellSouth Corporation ("BellSouth")
22 at 2; Comments of the United States Telephone Association ("USTA")
23 at 4-5; Comments of Multiplex Technology, Inc. ("Multiplex") at 5;
24 Comments of the Utilities Telecommunications Council ("UTC") at 4;
25 Comments at the Consumer Electronics Group of the Electric
26 Industries Association ("Consumer Electronics") at 6; Comments of
27 Building Industry Consulting Service International ("Building
28 Industry") at 3; Comments of Pacific Bell and Nevada Bell ("Pacific
29 Bell") at 1. WCA at 8; Nynex at 4; Bell Atlantic at 4-6; APPA at
30 14-17. WJB agrees with that approach, believing that, as with the

1 telephone industry, this approach would promote competition in the
2 marketplace.

3 Several commenters would condition the rights of an
4 homeowner to his wiring on the condition that the homeowner not
5 engage in theft of services. Comments of Community Antenna
6 Television Association, Inc. at 2; Time Warner at 18-19. WJB does
7 not advocate or condone the stealing of services, but believes that
8 the better solution to the theft problem is to establish strict
9 penalties for customers who use their wiring for such purposes.

10
11 3. The Commission's rules should apply equally to
12 services provided to single-family residences and
13 those provided to multiple-dwelling units.
14

15 Several commenters propose that the Commission's rules
16 not apply equally to multiple-dwelling units. Comments of National
17 Private Cable Association and Mixtel Cablevision ("NPCA") at 1-2;
18 Blade at 5-6; TCI at 8-9. WJB adamantly disagrees with this
19 approach.

20 In many multiple-dwelling units, the building owner or
21 property owner's association is the actual subscriber of the
22 services. In such cases, there is no reason that the so-called
23 "common wiring" should be treated any differently than the wiring
24 within the walls of a homeowner. In both cases, the same arguments
25 as to ownership should apply, i.e., the wiring is a fixture, it has
26 been abandoned, etc.

27 There is another, more practical, reason that common
28 wiring should belong to the building. In many cases, the molding
29 and other spaces within the building simply will not accommodate a

1 second set of wires. Liberty at 9. In other buildings, installing
2 new wiring or removing existing wiring would cause damage to the
3 structure. Therefore, at least in these buildings, denying
4 ownership of the wiring to the building would give the installer a
5 perpetual monopoly on the services, even if every resident wanted
6 to switch providers.

7 The concern was raised that a building could contract for
8 services, have the wiring installed, immediately cancel the
9 agreement, and be left with the wiring, in effect, having the
10 building wired free of charge. See Times Mirror at 3-5. From a
11 practical standpoint, this argument has little merit. Any
12 installer worried about such an occurrence can simply negotiate an
13 agreement of sufficient length to ensure compensation. If the
14 agreement is then canceled by the building, the installer would
15 have a remedy based on the breach of the agreement.

16 Finally, several commenters point to state mandatory
17 access laws as a reason for allowing them to claim continuing
18 ownership in wiring. Time Warner at 9-11; TCI at 9. If the effect
19 of these laws is to hinder competition and thwart the clear intent
20 of the 1992 Cable Act, such as by excluding an alternative provider
21 from a building, they should be declared invalid under the
22 Supremacy Clause of the United States Constitution, to the extent
23 that such laws would have an anticompetitive effect.

24 In most cases, however, the mandatory access laws were
25 enacted to ensure consumer choice, not to preserve the monopoly
26 status of the installer. Because a determination that the inside
27 wiring belongs to the building would make it possible for the

1 building owner to exercise choice, as opposed to being bound to the
2 installer, such a ruling would be consistent with the intent of
3 these laws.

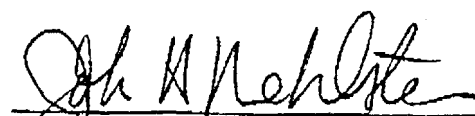
4 Consequently, the access laws are irrelevant to the issue
5 at hand. It is obvious that for two providers to serve a building,
6 there will need to be two sets of wires, at least to the point
7 where individual subscriber drops are connected to the cable
8 programming distribution system. Therefore, the real question is
9 which party, the building owner or the former provider, should be
10 responsible for installing a second set of wiring. Nothing in the
11 mandatory access laws or elsewhere would place this burden on the
12 building owner, especially where to do so would thwart competition.

13
14 For the reasons outlined above, as well as those
15 contained in its Comments, WJB-TV Limited Partnership believes that
16 the Commission should promulgate rules designed to promote
17 competition in the video marketplace, consistent with the
18 directives of the Cable Television Consumer Protection and
19 Competition Act of 1992.

20
21 Respectfully submitted this 14th day of December, 1992.

22
23 WJB-TV Limited Partnership

24 By its attorneys:

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